IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

SECOND APPEAL NO. 417 OF 1988

Shantaram Keshav Gokhale (since deceased, through his legal heirs). ... Appellant (Ori.Def.No.1)

V/s

1. Pushpa w/o Ramchandra Appa Manchekar (since deceased, through her legal heirs) & ors. ... Respondents (Nos.1 to 3 original plaintiffs and Nos. 4 to 6 original defendants 2 to 4.)

Shri V.S. Gokhale for the appellant.

Miss Swati E. Paradkar for the respondents.

CORAM: P.V. KAKADE, J.

DATED: 29TH SEPT., 2004.

P.C.:

1. Heard learned counsel for both parties. Perused the record.

2. This is an appeal preferred by the original defendant No.1 against the order dated 30.6.1987 passed by the Addl. District Judge, Sawantwadi, partly allowing the appeal and setting aside the lower Court's order declaring the plaintiffs 2 to 4 to be the owners

of the suit land. It was also directed that the defendant No.1 was permanently restrained from obstructing or otherwise interfering with plaintiff's possession of the suit land.

2. Plaintiff had filed the suit claiming that the suit land described in plaint alongwith compound is in their possession under an agreement of sale executed by defendant No.1 Shantaram Gokhale. According to the plaintiff No.1, her husband Ramchandra Manchekar was running a motor business and he wanted to construct a house by purchasing a land. Therefore, the plaintiff's husband entered into an agreement of purchase of the suit land admeasuring 6 gunthas from defendant No.1 for Rs.790/- in which agreement was executed on 10th July, 1957 and plaintiff was put in actual possession of that portion of the suit land. As the suit land was required to be converted into N.A., defendant No.1 had undertaken to make the suit land N.A. Even after obtaining the N.A. permission, all the necessary documents were given to plaintiff No.1's husband by defendant and as such the plaintiff's possession over the suit land has been admitted and confirmed by the defendant. Subsequently, plaintiff No.1's husband became sick for many days and he also believed that defendant will execute the sale

deed of the suit land, but no such sale deed has been executed and in the meanwhile plaintiff No.1's husband died in June, 1972. Plaintiffs 1, 2 & 3 and defendants 2 to 4 are children of Ramchandra and are his legal heirs. Plaintiffs are in continuous unobstruction and peaceful possession of the suit land for more than 12 years and so they have become owners of the suit land by principles of adverse possession. Hence the plaintiffs filed the suit for declaration and injunction against defendants apprehending that defendants would obstruct her peaceful possession in the suit property.

3. Defendant No.1 challenged the suit by filing written statement with contention that the plaintiffs had never acquired any title over the suit land and plaintiff No.1's father was not an agriculturist and could not get any title by any document which was void in law. He also denied the contention that the plaintiff had become owner by adverse possession. On such and under other grounds, suit was sought to be dismissed with costs.

4. the learned Trial Judge adjudicated the dispute on merits and came to the conclusion that the plaintiffs and defendants 2, 3 & 4 were heirs of deceased Ramchandra and proved that they become the owner of the

suit property by adverse possession and consequently defendant No.1 was permanently restrained from obstructing the possession of the suit property.

5. Being aggrieved by the said judgment and order, defendant No.1 preferred an appeal against the said order in the Court of Addl. District Judge, Sawantwadi. The learned Addl. District Judge adjudicated the dispute after hearing both parties and came to the conclusion that appeal deserves to be partly allowed and order of declaration to the effect that plaintiff and defendants 2 to 4 to be owners of the suit land was set aside. However, the order of permanent injunction against the defendant No.1 came to be confirmed. Hence the present appeal was filed only to the extent of order of permanent injunction against the defendant No.1.

6. After hearing the learned counsel for both parties and perusing the record, it is apparent that the substantial question of law was raised to the effect that whether respondent-plaintiffs were entitled to the relief of injunction in view of their not having got protected their title by sueing for specific performance of the agreement under which they came into occupation of the suit land.

7. At the outset, it may be noted that the learned lower Appellate Court Judge has recorded the finding to the effect that the plaintiff has not proved his adverse title and, therefore, the question of ownership title is decided against the plaintiff. However, the lower appellate Court Judge has held on the basis of the evidence that since the plaintiff was put in suit land in pursuance of an agreement of sale executed by the defendant No.1 after paying the entire consideration, it was obvious as well as admitted position that he was in lawful possession of the suit property. It is further held that the plaintiff deserves protection under Sec. 53-A under the Transfer of Property Act. The nature of right conferred by the said section is only available to the defendant to protect his possession. It is further observed that this is limited to cases where the transferee has taken possession and against whom the transferer is debarred enforcing any right other than that expressly provided by the contract. In this regard, the learned advocate for the appellant brought to my notice the ruling of the Supreme Court in the case of **Ranchhoddas Chhaganlal v/s Devaji Supdu Dorik, reported in A.I.R. 1977 SC 1517,** the ratio of which is to the effect that the doctrine of part performance is a

defence. It is a sword and not a shield. It is a right to protect his possession against any challenge to it by the transferer contrary to the terms of the contract. On the basis of this ratio, it was submitted that the right contemplated under Sec.53-A of the Transfer of Property Act cannot be invoked by the plaintiff because it is only to be used for protection of the defendant. In my considered view, this proposition is totally incorrect. No doubt that the doctrine of part performance is a defence, however, it is needless to mention that it is a right to protect possession against any challenge to it by the transferer contrary to the terms of the contract. If we take into account the admitted document of agreement of sale with facts to the effect that the entire consideration amount is paid and possession of the property is also handed over to the plaintiff since the year 1957, it would be for the plaintiff to invoke such right to defend his property from the defendant No.1 and for this purpose, the learned lower Appellate Court has held that the suit was sustainable in law so far as perpetual injunction was concerned. I do not see any reason why this Court should interfere with this order of the lower Court so far as the perpetual injunction is concerned. It is also needless to mention that the very contentions

raised by the defendant No.1 in the course of his pleadings are sufficient to show that he intended to obstruct the possession of the plaintiff and, therefore, the plaintiff has every right to protect his property under Sec.53-A of the Transfer of Property Act.

9. Thus, I do not see any merit in the appeal and hence the appeal stands dismissed.

Under the circumstances, there shall be no order as to costs.

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